

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-1436

Docket No. 75-8374

see

B.

P/S

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATE OF AMERICA

Appellee

-vs-

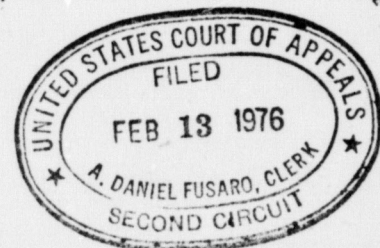
GREEN BARRY MULLENS

Appellant

BRIEF AND APPENDIX FOR APPELLANT

THIELMAN & LALIME

Attorney for the Appellant
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA

Plaintiff-Appellee

-vs-

B R I E F

GREEN BARRY MULLENS

Docket No. 75-8374

Defendant-Appellant

STATEMENT

The Defendant-Appellant, GREEN BARRY MULLENS, was indicted on December 12, 1973, (A- 4)¹ on charges of making counterfeit obligations of the United States in violation of Title 18, United States Code, Section 471 and possession of counterfeit obligations in violation of Title 18, United States Code, Section 472.

Pursuant to a search warrant obtained by the Buffalo Police Department from a City Court Magistrate on December 7, 1973, the premises of 1536 Jefferson Avenue, Buffalo, New York was searched wherein a brown paper bag was discovered in the possession of the Defendant-Appellant's mother, which contained scraps and pieces of counterfeit \$10 and \$20 federal reserve notes.

Subsequently, the Defendant-Appellant was arrested by the Buffalo Police Department when he surrendered himself at their headquarters in Buffalo, New York.

On the 7th of March, 1974, his Suppression Motion was commenced against the evidence seized as a result of the execution by the Buffalo Police Department of said aforementioned search warrant of 1536 Jefferson Avenue.

1 Reference to Appendix

A subsequent Hearing was held before the Honorable John T. Curtin on May 14, 1974, whereupon he made his decision on October 4, 1974, (A-6) stating that "the Affidavit does not set forth a sufficient basis in fact for the informant's statement that the money was counterfeit, and so the warrant must fail." This Order of October 4, 1974, was affirmed without opinion by the United States Court of Appeals for the Second Circuit on January 30, 1975.

After several memorandums and oral arguments on the suppression of the oral admissions and subsequent search of 361 Fillmore Avenue and 25 Wakefield Avenue, both of Buffalo, where the counterfeiting paraphernalia was found, Judge John T. Curtin denied the Motion to the Defendant-Appellant, GREEN BARRY MULLENS (A-15).

The Defendant-Appellant, GREEN BARRY MULLENS, pled guilty on October 29th, 1975, to Title 18, United States Code, Section 471, the first count of the indictment (A-4), wherein the Defendant-Appellant reserved his right to appeal the Order of Judge John T. Curtin issued on October 9, 1975 denying the Defendant-Appellant's Suppression Motion. (United States v. Rothberg, 480 Fed. 2d 534; United States v. Farullo, 506 Fed. 2d 490).

The Defendant-Appellant was sentenced to four years in the custody of the Attorney General on December 1, 1975. The Defendant-Appellant is presently free on bail pending instant appeal from the Order of October 9, 1975.

QUESTION PRESENTED

The question presented for the Court of Appeals is whether or not Judge John T. Curtin of the Western District of New York erred when he failed to suppress the oral admissions and the subsequent real evidence discovered as a result of those admissions as having such a strong nexus by the initial illegality of the search and the discovery of the counterfeit paraphernalia.

STATEMENT OF FACTS

On December 7, 1973, a search was conducted of 1536 Jefferson Avenue in the City of Buffalo. The search was conducted pursuant to a search warrant issued by the Buffalo City Court.

That upon entering the aforesaid premises, law enforcement officers, after search of same, discovered scraps and pieces of counterfeit \$10's and \$20's in a paper bag that Cornelia Mullens, the mother of the Defendant-Appellant had attempted to secrete. This search took place at approximately 11:00 a.m. Mr. and Mrs. James Mullens were escorted to the Buffalo Police Headquarters where they were subsequently "interviewed" by the police department. Subsequent thereto, the Defendant - Appellant, GREEN BARRY MULLENS, at about 2:30 p.m., was escorted to the Buffalo Police Headquarters by a cadet of the Buffalo Police Department who happened to be a relative of the Defendant-Appellant, who was acting under the direction of Sgt. James Hunter, the senior officer of the investigation. The Defendant-Appellant then realized the difficulties that confronted his father and mother, who had to appear under arrest from the circumstances surrounding the incident because of the many

police and secret service agents involved, did "volunteer" the information that he was the one fully responsible for the counterfeiting, and also was willing to cooperate with the law enforcement officers in return for a promise that neither his mother or father would be prosecuted for these crimes.

The Defendant-Appellant then led law enforcement officers to two locations, thereby resulting in the recovery of counterfeit money and plates, together with other paraphernalia used in his counterfeiting operation.

ARGUMENT

WHETHER THE COUNTRABAND SEIZED AT THE WAKEFIELD STREET ADDRESS BASED UPON THE "FRUIT OF THE POISONOUS TREE" DOCTRINE IN LIGHT OF THE COURT'S SUPPRESSION OF THE SEARCH WARRANT INITIALLY ACTIVATED THE CHAIN OF EVENTS LEADING TO THE DISCOVERY.

The Defendant-Appellant contends that the aforementioned searches and "confessions" are so closely aligned with the illegal search and seizure noted by the suppression of the search warrant for 1536 Jefferson Avenue, that they too should be suppressed, pursuant to the doctrine of the "fruit of the poisonous tree."

The case of Wong Sun v. United States, 371 U.S. 471, 83 Sup. Ct. 407 (1963) clarify the area that we have at bar. The Court will recall that Toy, in his bedroom, made an incriminating statement. (Some days later after he had been released and arraigned, he voluntarily returned and made a written statement.)

With respect to Toy's first oral statement made in his bedroom upon arrest, the Court said:

"The exclusionary rule has barred from trial physical, tangible materials obtained either during or as a direct result of, an unlawful invasion. It follows from our holding in Silverman v. United States, 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers in effects'. Similarly, testimony as to matters observed during unlawful invasion has been excluded in order to enforce the basic constitutional policies. (McGinnis v. United States, 227 Fed. 2d 598.) Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case, is no less the 'fruit' of official illegality than the more tangible fruits of the unwarranted intrusion. See Nueslein v. District of Columbia, 115 Fed. 2d 690. Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence. Either in terms of deterring lawless conduct by federal officers, Rea v. United States, 350 U.S. 214; or of closing the doors of the federal courts to any use of evidence unconstitutionally obtained, Elkins v. United States, 364 U.S. 206; the danger in relaxing the exclusionary rules in the case of verbal evidence would seem too great to warrant introducing such a distinction."

In this particular case, a confession was excluded on the basis that it was "seized" during an unreasonable trespass. The court will recall that Toy's oral statement had led to a co-defendant, Yee, in whose home narcotics were in fact found.

The court held that the tangible product, the narcotics, were not admissible in evidence because as the government conceded, they would not have found the narcotics "except that Mr. Toy helped us to." The court reasoned that such discovery was not "from an independent source" but on the contrary the connection between the lawless conduct of the police and its discovery had not "become so attenuated as to dissipate the taint." (Nardone v. United States, 308 U.S. 338).

The test suggested by the court in the Wong Sun case for all inquiry with respect to "poisoned" evidences:

"We need not hold that all evidence is 'fruit of the poisoned tree' simply because it would not have come to light but for the illegal actions of the police. Rather the more apt question in such a case is 'whether granting the establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

Judge Curtin's Order of October 9, 1975 indicates that he relied heavily on the case of Wickline v. Slayton, 356 Fed. Sup. 140 (E.D. VA 1973) wherein the Appellant Wickline was arrested at his brother-in-law's home after what turned out to be an illegal search of the premises. Wickline refused a statement to the police until he saw his brother-in-law arrested whereupon he agreed to cooperate by giving a statement which the police refused until an attorney was present. Wickline insisted on giving evidence and statements of unrelated crimes which the court held to be voluntary. The court said in its decision "there must be a strong nexus or interrelationship between the initial illegality of the search and any subsequent confession to render the confession inadmissible, which nexus can be shown only where decision to speak affected by prior constitutional error; where the statement is given voluntarily without unlawful coercion either physical or psychological, the nexus attenuated as to dissipate the taint." The courts went on to say that "where the unlawfully obtained evidence exerts a substantial influence on a persons decision to speak, that this evidence is tainted with the initial constitutional error. This case speaks of prior refusal to speak by Wickline which they said clearly demonstrates a rational state of mind and the minimal

influence the seized evidence played in his later decision to confess. The courts indicated that the police neutralized the "illegal taint". The subsequent confession by Wickline of unrelated crimes had no bearing whatsoever on the evidence seized by the constitutional error. See United States v. Close, 349 Fed. 2d 841 (4th circuit) which said that the subsequent confession put taint where it was direct result of confrontation with the "fruits of the seizure."

Judge Curtin also relied on United States v. Donald A. Brandon, 467 Fed. 2d 1008 (9th circuit, 1972) of which this court is familiar with, wherein the Appellant Brandon appealed after counterfeiting money was found in possession illegally and which was suppressed before the District Court trial. The law enforcement officials investigating the Brandon case did not stop their investigation with the findings of the counterfeit money by illegal means. They continued their investigation and did good police work in that, they went to the house that the Appellant Brandon said belonged to his wife, where in turn they did seek and get the wife's permission to search the premises whereupon they did find additional evidence which subsequently led to Brandon's conviction and denial of appeal.

The Brandon case supports the Defendant-Appellant Mullens case even stronger in that independent investigation by law enforcement was absolutely necessary in order to break the nexus of the illegal taint.

THE SECOND QUESTION IS, IF THE APPELLANT'S "CONSENT" WAS VOLUNTARILY OBTAINED TO SEARCH THE TWO QUESTIONED PREMISES IN LIGHT OF THE PHYSICAL AND PSYCHOLOGICAL PRESSURES PLACED UPON THE DEFENDANT-APPELLANT WITH REGARD TO THE SITUATION INVOLVING HIS PARENT'S CUSTODIAL INTERROGATION AND "DETENTION."

Another dilemma of the law raises its ugly head in the form of "consent." The testimony of the arresting officers, both State and Federal, indicate a consent and willingness to purge his tired chest of the burden of his guilt by giving all the information directly to the police. A search made without a warrant is valid if it can be conducted with the voluntary consent of the person affected by the search. See Davis v. United States, 328 U.S. 582 (1946). It can be said that consent operates as a waiver of one's constitutional right to be free from a search which the police have no right to make, or a statement which the police have no right to be a party of. To establish the validity of a search, therefore, the government must show the consent was given voluntarily.

To determine whether the consent was voluntary, the courts generally have applied a totality of the circumstances test. The issue is phrased in terms of whether consent was given in an exercise of free will, or whether it was given in the acquiescence to or in peaceful submission to an assertion of authority by police. Because the determination depends upon a particular Defendant's state of mind, generalization is not too helpful, but a few recurring factors may be noted. That if the Defendant is under arrest, even though lawful, it may be enough itself to invalidate a subsequent consent to search. Judd v. United States, 190 Fed. 2d 649 (D.C. circuit, 1951).

The totality test is not applied in the case in which the officers

have acted illegally and the consent immediately follows the unlawful conduct. It is conclusively presumed that the consent was given in submission to the unlawful assertion of authority, rather than in the exercise of free will. Thus, consent given immediately after an illegal arrest, entry or search, is not effective. Wong Sun v. United States, supra.

The question of consent as indicated above becomes one of fact. United States v. Fike, 449 Fed. 2d 191, (5th circuit); Perkins v. Henderson, 418 Fed. 2d 441 (5th circuit). In addition, the consent must be voluntary and uncoerced, either physically or psychologically. United States v. Fike, supra. The courts have further stated that the government has the full burden of proof to establish that consent was voluntary. United States v. Miles, 449 Fed. 2d, 1272 (10th circuit). In addition, voluntary consents, as a matter of law, are not favored by the courts of this country. United States v. Dichiarinte, 445 Fed. 2d 126 (7th circuit).

Further a search conducted pursuant to a warrant which is later held to be invalid cannot be justified by that consent. Bumper v. North Carolina, 391 U.S. 543, 88 Sup. Ct. 1788. Also, the courts of this circuit have held that consent can be voluntary if it can be established that the consent was given by the promise that another close relative will not be prosecuted if the Defendant cooperated with the police. United States ex rel Metze v. State of New York, 303 Fed. Sup. 1359 (S.D.N.Y. 1969). In the Metze case, Judge Frankel, pursuant to a Habeas Corpus Petition, held that initially no probable cause existed for the issuance of the original search warrant. The execution of that search warrant subsequently led to the seizure of contraband and to the eventual conviction of the defendant. In that case, the

court held that no "underlying circumstances" did exist for the original affidavit based upon an informer's information supplied to the police. The court therein cited Aguilar v. Texas, 378 U.S. 108. 84 Sup. Ct. 1509 (1964) and Spinelli v. United States, 393 U.S. 410. 89 Sup. Ct. 584 as authority. In addition, the court went on to discuss the question of the voluntary consent for the search of the defendant's automobile after the defendant's arrest. It was established that contraband was found in the automobile's trunk, which the wife of the defendant owned. It was also established that the wife, at the time was a civil servant, and the possible implication with any illegal activity might jeopardize her job. The court, although not basing the case upon this ground, held that there appeared to be enough to reverse the case upon the fact that the consent was given involuntarily by the defendant for the sole purpose of protecting his wife and preventing her implication in the crime. The court went on to hold that the subsequently seized contraband should be suppressed, based upon the direct "taint" of the search pursuant to Wong Sun v. United States, supra. It also went on to state that the State of New York failed to establish its burden of proof that the consent in effect was a voluntary one. The court therein cited United States v. Como, 340 Fed. 2d 891 (2nd circuit, 1965).

By direct testimony of Secret Service Agent Samuel J. Zona, the defendant was quite concerned during the questioning by him and members of the Buffalo Police Department, as to what the status was with regard to his mother and father. Agent Zona, at page 97 of the transcript, indicates that the defendant, "was very worried about his parent's problem." Agent Zona indicated

that he told the defendant that "we really have the goods on your mother as far as possession, we want full cooperation at this point." By his own admissions, Agent Zona, at page, 99, admits "he (defendant) told us he wanted to cooperate, if we did not lock up his mother." At page 100, Agent Zona stated: "I promised him in my own words that if he cooperated, nobody else would be arrested, based on what he told us." (A-22)

CONCLUSION

The government throughout the proceedings of the case at bar, had cited cases in support of their case that are very strong arguments for the Defendant-Appellant. In the case of United States v. Davis, 344 Fed. Sup. 328 (1972), it was a failure on the part of the investigating agency to conduct an independent investigation and as a result, the evidence seized from the illegal confession was excluded from court. In the United States v. Follette, 371 Fed. 2d 426, the conviction was sustained because of investigations conducted independent and exclusive of the illegally obtained evidence. In the United States v. Carino, 417 Fed. 2d 117, the illegally obtained evidence was not the direct result of the conviction. The subsequent investigation for an independent source shows no question as to what the courts relied upon to convict the defendant Carino.

The police officer's testimony in the case against the defendant shows that they did not have any independent investigation and they would have been completely in the dark, if the Defendant-Appellant was not "coerced" into admitting his complicity in the instant crime. The so-called confession of the Defendant-Appellant came clearly as a result of the illegal search with no intervening investigation to remove the "primary taint." The psychological pressure exerted on the Defendant-Appellant, knowing that his mother and father were under arrest, or at least being "detained", was not the product of a voluntary confession. The government has not shown, by any stretch of the imagination, that the Defendant-Appellant was acting in his own free will,

but was forced by two illegal acts of the government. The first one, being the illegal search and second, the illegal detaining of the Defendant-Appellant's parents to coerce him into psychological defeat. There is no question from the cases cited in the Defendant-Appellant's memorandum, that free will can be abrogated by the promise not to implicate a member of one's family.

Therefore, in conclusion, the evidence obtained at police headquarters by the Defendant-Appellant, GREEN BARRY MULLENS, and the products of any of those admissions and/or confessions should be suppressed.

DATED: BUFFALO, NEW YORK
February 11, 1976

Respectfully submitted,

THIELMAN & LALIME
Attorneys for Defendant-Appellant
Office and Post Office Address;
1710 Liberty Bank Building
Buffalo, New York 14202

A P P E N D I X

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1-A

مجلس الشورى

CR - 1973 - 275

Offenses: 12/7/1972

1 Ct.

J. S. 2 mailed

Clerk

J. S. 3 mailed

Marshal

Violation

Docket fee

Title 18

Sec. 471, 472

DATE
1973

PROCEEDINGS

Dec. 12 Filed Indictment

Dec. 12	J.S. 2 made
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Dec. 17 Arraignment Adj. 1/2/1974

Dec. 14 1974	Filed Magistrate's docket sheet, Complaint, and \$10,000 recog. bond
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Jan. 2	Plea of not guilty entered by Deft; recog. bond continued; motions set as ret. 1/21/1974.
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Jan. 3	Filed Ct. Steno's minutes of 1/2/1974
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Jan. 21	The Govt advises that no motions received. The Court noted case will be set for trial upon conclusion of trial in Cr-1973-175
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Jan. 28	Filed Deft's notice of motion to allow the deft. the right to examine inspect, copy, photograph, and etc., confessions, admissions statements made by the deft. to Govt. agents, knd etc., ret. 2/4/1974
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Feb. 4	Adj. two weeks--
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Feb. 12	Filed Govt's response to certain pre-trial motions made by the deft.
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Feb. 25	Adj. to 3/11/1974 for Return of motions. Govt. instructed to advise the Deft. by letter.
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DATE	PROCEEDINGS
1974	
ar. 11	Adj. 3/25/74; Govt. instructed to furnish written authorities against jurisdiction on suppression hearing.
Mar. 22	Filed Deft's notice of motion for vacation of search warrant; suppression evidence and return of evidence to deft., ret. 3/25/74
Mar. 25	Adj. 4/29/1974 to set date for hearing
Apr. 29	Set date for trial. Court schedules suppression hearing for 5/3/1974 at 2:00 P.M.
May 10	Filed Five subpoenas - JoAnn Wachowski, Patricia Formanek, Donald Wilson, Mary Knobloch, Det. Sgt. James E. Hunter, served 5/8/1974
May 14	Hearing on Motion to suppress - After evidence closed, the Court advised counsel that when the transcript of the hearing is received the Court will set date for filing of briefs
June 26	Filed Ct. Steno's transcript of the Proceedings of May 14, 1974
Aug. 2	Filed deft's memorandum of law
Aug. 5	Return date for briefs. Adj. to 8/26/74 for Govt's brief.
Aug. 26	Filed Govt's memorandum of law.
Oct. 4	Return date for briefs. Submitted.
	Filed Decision and Order that this Court concludes that the search and seizure of the premises at 1536 Jefferson Avenue were conducted in violation of the Defendant Greene Berry Mullen's--fourth amendment rights and the fruits of that search are, therefore suppressed. At this time the court will defer ruling on the suppression of the oral statements made by the defendant while he was in custody and the evidence obtained in the searches of 25 Wakefield and 1361 Fillmore Avenue until after counsel have had an opportunity to brief the questions presented in the light of this order to suppress. Briefs shall be filed on the question remaining not later than November 4, 1974.--CURTIN, J.
Nov. 1	Filed Govt's notice of motion and affidavit for an order opening a suppression hearing held before the court on 5/14/74 for purposes of allowing the Govt to submit additional evidence re: issuance of search warrant on 12/7/73 Ret. 11/11/74
Nov. 1	Filed Govt's notice of appeal from the Suppression Order suppressing the fruits of the search of premises known as 1536 Jefferson Ave., pursuant to warrant issued 12/7/73; cy. to deft's atty., and CCA with statement of docket entries.
Nov. 1	Filed Govt's certificate on appeal
Nov. 4	Return date for briefs. Adj. 11/11/1974.
Nov. 11	Motion by Govt. to open suppression hearing. Adj. to 11/21/74 at 9:30
Nov. 18	Original pertinent papers, clerk's certificate, and copy of docket entries mailed to the CCA.
Dec. 2	Oral Argument - Counsel to submit briefs by 12/4/74, adj. to 12/9/1974 at 2:00 P.M.
Dec. 3	Filed Govt's memorandum of Law
Dec. 4	Filed Govt's Supplemental Memorandum
Dec. 4	Filed Defendant's memorandum of Law
Dec. 9	Oral argument. Adj. to 2:00 PM on 12/16/74
Dec. 16	Oral Argument - Submitted.
1975	
Jan 3	Filed Decision and order denying Govt's motion to reopen the suppression hearing and directing parties to file briefs not later than 2/3/75, CURTIN, J.
Mar. 31	Filed certified copy of Order from the CCA that the Judgment of the District Court be and it hereby is affirmed on Judge Curtin's opinion, Cr-1973-375 (W.D.N.Y. October 4, 1974).

DATE 1975	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
Mar. 31	Orig. papers returned from the CCA		
Apr. 21	Status report. Briefs are to be filed by the parties by 5/12/75		
May 6	Filed Govt's supplemental memorandum		
May 8	Filed deft's supplemental memorandum		
May 12	Return date for additional briefs. Government & deft. have filed briefs. Submitted.		
June 23	Return date for additional briefs. Government to file today.		
June 24	Filed letter dated 6/20/75 to the Court, from Atty. James Lalime, esq., Atty. for deft., in reference to letter from the Court, dated 5/16/75		
June 24	Filed Govt's reply memorandum		
Aug. 4	Defts. response to Govt's reply. All briefs filed. Submitted.		
Oct. 9	Filed Decision and Order that the motion of the defendant to suppress the evidence cited in this decision is denied. -- CURTIN, J.		
Oct. 20	Set date for trial. Case ready for trial. Adj. to Oct. 22 for pre-trial meeting.		
Oct. 22	Pre-trial meeting held. Deft. may plead guilty to a superseding Indictment. Adj. to Oct. 29 for further pre-trial meeting.		
Oct. 28	Status report. Adj. to 10/29/75 for plea		
Oct. 29	Deft. present with counsel, enters a plea of guilty to count One of the Indictment. Sentence is deferred 12/1/75 ; Deft. reserves his right to appeal the court's decision of 10/9/75.		
Dec. 1	Filed \$10,000 personal recognizance bond for deft. replacing bond XXXXX-XX-XX Pending deft's appeal from Ord. dated 10/9/75		
Dec. 1	On motion of the Government defendant is sentenced on Count 1 as follows: Defendant is sentenced to custody of Atty. Gen. for a period of Four (4) Years. CURTIN, J.		
Dec. 1	J.S. 3 made		
Dec. 4	Filed Defendant's notice of appeal from an Order of the Court entered on October 9, 1975		
Dec. 8	Cy. of notice of appeal, mailed to U.S. Atty., deft., and the CCA with statement of docket entries,		
Dec. 9	Filed J & C execution issued to U.S. Marshal pending disposition of appeal. Curtin J.		
Dec. 22	Orig. Pertinent papers, Index, Clerk's certificate, Docket entries, mailed to the Clerk, CCA		

No. 1973 375

UNITED STATES DISTRICT COURT

WESTERN District of NEW YORK

~~SECTION~~

THE UNITED STATES OF AMERICA

vs.

GREENE BERRY MULLENS

INDICTMENT

A true bill,

J. Richard S. Little

Foreman.

Filed in open court this 11th day
of December, A. D. 19 73

Clerk.

Ball, §

IN THE DISTRICT COURT OF THE UNITED STATES

For the Western District of New York

THE UNITED STATES OF AMERICAN

-vs-

GREENE BERRY MULLENS

NOVEMBER 1973 SESSION
Impaneled Nov. 13, 1973
No 1973 375
Vio. Title 18, U.S.C.,
Sections 471 and 472

COUNT I

The Grand Jury Chares:

On or about the 7th day of December, 1973, in the Western District of New York, the defendant, GREENE BERRY MULLENS, did knowingly, unlawfully and with intent to defraud, counterfeit and falsely make obligations of the United States; all in violation of Title 18, United States Code, Section 471.

COUNT II

The Grand Jury Further Charges:

On or about the 7 th day of December, 1973, in the Western District of New York, the defendant, GREENE BERRY MULLENS, did willfully, knowingly and unlawfully keep in his possession counterfeit and falsely made obligations of the United States; all in violation of Title 18, United States Code, Section 472.

JOHN T. ELFVIN
United States Attorney

A TRUE BILL:

6-3

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

CR-1973-375

GREENE BERRY MULLENS,

Defendant

DECISION
and
ORDER

CURTIN, DISTRICT JUDGE

Decision and Order

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-VS-

CR-1973-375

GREENE BERRY MULLENS,

Defendant

APPEARANCES: JOHN T. ELFVIN, Esq., United States Attorney (ROGER P. WILLIAMS, Esq., of Counsel), Buffalo, New York, for the Government.

THIELMAN & LALIME (JAMES L. LALIME, Esq., of Counsel), Buffalo, New York. for Defendant.

The defendant in this case is charged in a two-count indictment with falsely making counterfeit obligations of the United States, in violation of Title 18, United States Code, Section 471, and with possession of counterfeit and falsely made obligations of the United States, in violation of Title 18, United States Code, Section 472.

The defendant has moved to suppress the fruits of a search of 1536 Jefferson Avenue in the City of Buffalo, conducted pursuant to a Buffalo City Court

Decision and Order

-2-

search warrant issued on the same day as the search, December 7, 1973. The suppression hearing was held before this court on May 14, 1974. The court has reviewed the transcript and the briefs supplied by the parties. The following constitutes the court's findings of fact and conclusions of law.

On December 7, 1973, Detective Sergeant James E. Hunter, of the Buffalo Police Department, made application for and obtained a search warrant for a search of the premises located at 1536 Jefferson Avenue, Buffalo, New York. The search warrant was obtained on the basis of information set forth in Sergeant Hunter's affidavit, which information he had obtained from an unidentified informant on December 6. The affidavit for the search warrant stated in relevant part:

I have information based upon a reliable informant known to me for several years who in the past has given me information that has lead [sic] to arrest [sic] and convictions of other persons that he gave me information on, [sic] has informed me that the above named person residing at the above named address has several hundred \$10.00 bills counterfeit that he is attempting to sell and pass the same. This informant

Decision and Order

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gave information that led to the arrest and conviction of one Ronald Kohlman for bank robbery December 1971 Judge Curtin. Also that on December 5, 1973 informant did see a suit case [sic] with the said bills in it at the above address and in the possession of Barry Mullens.

At approximately 10:30 a.m. that same day, Sergeant Hunter, accompanied by two policewomen and four police officers from the Buffalo Police Department, and two Secret Service agents, proceeded to the premises located at 1536 Jefferson Avenue which were occupied by James Mullens and his wife, parents of the defendant. Sergeant Hunter informed them that he had a search warrant for the premises based on the belief that there was counterfeit money located there. The officers then proceeded to search the premises. During the search, Policewoman Mary Knoblock found an A & P shopping bag filled with counterfeit ten and twenty dollar bills in the possession of the defendant's mother. The bag and bills were turned over to Sergeant Hunter and he proceeded to take Mr. and Mrs. Mullens down to police headquarters for questioning. Shortly thereafter, the defendant Mullens, upon learning of his parents'

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detention, arrived at police headquarters, escorted by his cousin who was a police cadet, and was taken into custody. Sergeant Hunter orally informed him of his constitutional rights by reading from a card. This card was then signed by the defendant. The defendant was promised by Secret Service Agent Zona that his parents would not be arrested if he would cooperate with the police. After talking with Sergeant Hunter, the defendant led the Sergeant and Secret Service Agents Zona and Hume to 25 Wakefield Street in Buffalo, where the defendant turned over to the police aluminum plates used for the production of currency. They then proceeded to 1361 Fillmore Avenue in Buffalo where they found a completely operational Davidson offset press and other paraphernalia used in the printing of currency. Prior to leaving the premises, the police photographed the complete printing operation. They then returned to police headquarters.

Back at police headquarters, the defendant was readvised of his constitutional rights by Agent Zona and he executed a waiver of rights form. The defendant then

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gave a recorded statement of his involvement in the counterfeiting scheme in response to questions by Agents Zona and Burns.

The defendant in this case seeks to have the counterfeit ten and twenty dollar bills which were seized at 1536 Jefferson Avenue, the oral statements made by him to the police while he was in custody, and the printing press, aluminum plates and other paraphernalia seized at 25 Wakefield and 1361 Fillmore Avenue suppressed. In view of the defendant's argument here that all evidence obtained after the search of 1536 Jefferson Avenue was the fruit of an illegal search and seizure, the legality of the search at 1536 Jefferson Avenue is of primary importance. The defendant argues that no probable cause existed for the issuance of the search warrant here because sufficient underlying circumstances were not set forth in the affidavit in order for the City Court Judge to make a finding of probable cause. The government argues that probable cause does exist in this case, since the affidavit sets forth personal observations of the informant from which he gained

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his information. This court is in agreement with the defendant that probable cause for the issuance of the search warrant in this case was not established.

The relevant portion of the affidavit does not set forth a sufficient basis for a finding of probable cause. Under the Supreme Court decisions of Aquilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1968), the standard by which probable cause is determined is twofold. First, the informant must be reliable and the affidavit must set forth reasons why this is so. Second, the affidavit must set forth the underlying circumstances upon which the informant based his conclusions.

As to the reliability of the informant, there is no problem. The affidavit points out that the informant was known to the officer for several years, had given information leading to arrests and convictions, and had given information leading to the arrest and conviction of a Ronald Kohlman. This is enough for the Magistrate to find that the informant is reliable.

As to adequacy of the facts set forth upon which the informant based his conclusion, the affidavit is insufficient. Under Aquilar, the affidavit must give information as to the factual basis of the informant's conclusion. In the present affidavit, all that is stated is that "Berry Mullens . . . has several hundred ten dollar bills counterfeit" The only fact upon which this statement could possibly be based is ". . . that on December 5, 1973 informant did see a suit case [sic] with the said bills in it at the above address and in the possession of Barry Mullens." The question arises how did the informant know that the bills were counterfeit? Upon what was that statement based? There is nothing in the affidavit to support this and, at the suppression hearing, Sergeant Hunter testified that the informant had not given him any information in the past that indicated the informant could tell counterfeit money. (Tr. at 37.) Thus, the affidavit does not set forth a sufficient basis in fact for the informant's statement that the money was counterfeit, and so the warrant must fail. The City Court Judge had

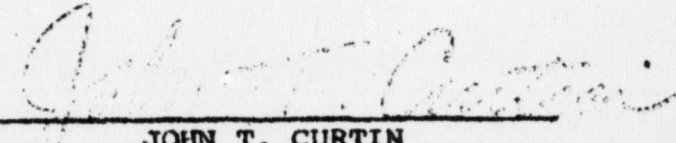
-8-

no basis for exercising the required independent judgment on the question of whether the informant's conclusion was more than surmise or repetition of rumor. See also United States v. Harris, 403 U.S. 573 (1971); United States v. McNally, 473 F.2d 934 (3d Cir. 1973), and DeAngelo v. Yeager, 490 F.2d 1012 (3d Cir. 1973).

For the foregoing reasons, this court concludes that the search and seizure of the premises at 1536 Jefferson Avenue were conducted in violation of the defendant's fourth amendment rights and the fruits of that search are, therefore, suppressed. At this time the court will defer ruling on the suppression of the oral statements made by the defendant while he was in custody and the evidence obtained in the searches of 25 Wakefield and 1361 Fillmore Avenue until after counsel have had an opportunity to brief the questions presented in the light of this order to suppress.

Briefs shall be filed on the questions remaining not later than November 4, 1974.

So ordered.


JOHN T. CURTIN
United States District Judge

DATED: October 4, 1974

1000

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

CR-1973-375

GREENE BERRY MULLENS,

Defendant

DECISION
and
ORDER

CURTIN, DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-VS-

CR-1973-375

GREENE BERRY MULLENS,

Defendant

APPEARANCES: RICHARD J. ARCARA, ESQ.
United States Attorney
(ROGER P. WILLIAMS, ESQ., of Counsel)
Buffalo, New York, for the Government.

THIELMAN & LALIME (JAMES L. LALIME, ESQ.,
of Counsel), Buffalo, New York, for the
Defendant.

On October 4, 1974 this court entered an order suppressing certain evidence seized as the result of a search made at 1536 Jefferson Avenue, Buffalo, New York. That order was affirmed without opinion by the United States Court of Appeals for the Second Circuit on January 30, 1975 and the government's petition for a rehearing was denied on March 27, 1975.

In the original order of October 4, the court directed the parties to file briefs concerning the admissibility of other physical evidence seized and oral

statements made by the defendant subsequent to the search of the premises at 1536 Jefferson Avenue. Admissibility of the following items remains for determination:

1. A printing press and other counterfeiting paraphernalia seized at 1361 Fillmore Avenue, Buffalo, New York;
2. Aluminum plates used in the counterfeiting seized from 25 Wakefield Avenue, Buffalo, New York;
3. An oral admission made by the defendant at Buffalo Police Headquarters, and
4. A signed confession of the defendant made at the United States Secret Service office.

The facts leading up to the search of the Jefferson Avenue premises are set forth in the court's order of October 4 and these facts will be considered part of this decision. During the hearing held on May 14, 1974 the following pertinent facts were also developed.

When the officers arrived at the Mullens family home about 10:30 or 11:00 a.m. on December 7, 1973, they searched the premises, found the suppressed

counterfeit money and then took the parents of the defendant to police headquarters. They arrived there about 12:30 p.m. and the officers proceeded to question Mr. and Mrs. Mullens about the counterfeit money. While they were being questioned by the officers, a police cadet, a cousin of the defendant, talked to Detective Sergeant Hunter, who was in charge of the investigation, and then contacted Mullens. Mullens said he was willing to come to police headquarters, but he wanted the police cadet to pick him up. Mullens appeared at police headquarters at about 1:30 or 2:00 p.m. Upon arrival, he immediately volunteered that he was the one who "did it" and that he was responsible for the whole thing. Hunter testified that he immediately "had to shut him up so I could read him his rights." After Hunter advised Mullens of his Miranda rights, Mullens waived them, admitted his role in the counterfeiting scheme and consented to a search of 1361 Fillmore Avenue. Secret Service Agent Zona appeared at police headquarters at about 2:15 to 2:30 p.m., after defendant had already admitted complicity to Sergeant Hunter. Zona promised Mullens that no one

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else, including his parents, would be charged if Mullens cooperated. After this, the defendant provided a written consent to search the premises at 1361 Fillmore Avenue where he kept a printing press. After the consent to search was executed, Mullens said: "We have to go to Wakefield Street first." At this address, which was unknown to the officers, Mullens delivered counterfeiting plates voluntarily to Hunter. After leaving Wakefield Avenue, they went to the Fillmore Avenue address where the printing press was located, and then proceeded to Secret Service headquarters where Agent Zona again advised Mullens of his rights pursuant to Miranda, and a short time afterwards Mullens gave a detailed written confession.

Citing Wong Sun v. United States, 371 U.S. 471 (1963), Davis v. United States, 328 U.S. 582 (1946), United States ex rel. Metz v. State of New York, 303 F.Supp. 1359 (S.D.N.Y. 1969), and other cases, the defendant argues that the evidence seized at Fillmore and Wakefield Avenues and the subsequent statements made by

the defendant were the direct product of the illegal search at Jefferson Avenue and the coercion placed upon the defendant because he knew that the officers were questioning his parents. The government urges that Wong Sun v. United States, supra, requires that the evidence be admissible. The Court in Wong Sun said:

[T]he more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959).
371 U.S. at 488.

The government argues that there was no exploitation of the illegality because Mullens voluntarily came to police headquarters, voluntarily talked to Sergeant Hunter and to Agent Zona after being advised of his rights, and voluntarily took the officers to the places where the evidence was located. No coercive tactics were used by the officers. The questioning was brief. There was no illegal bargain made by the police for the officers did not threaten the arrest of the parents in order to elicit a confession from the defendant. See Wickline v. Slayton,


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356 F.Supp. 140 (E.D.Va. 1973), and United States v. Brandon, 467 F.2d 1008 (9th Cir. 1972).

In Wong Sun the questioning took place immediately after the illegal search, under circumstances of compulsion. That was not the case here. The motion of defendant to suppress the evidence cited in this decision is denied.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: October 9, 1975

1 THE WITNESS: Yes, I did. The bag was there and
2 it was emptied in front of me and examined
3 and the money put back into the bag and
4 the bag was given to me.

5 BY MR. WILLIAMS:

6 Q. Did you determine the bills contained in that bag to be
7 counterfeit?

8 A. Yes, I did.

9 Q. Mr. Zona, let me show you Government Exhibit 2 and I
10 ask whether or not that is the bag you received?

11 A. Yes, that is the bag.

12 Q. And where is that at the present time?

13 A. It is in the Secret Service safe in our office.

14 Q. Now, Mr. Zona, did there come a time when you left the
15 premises?

16 A. Yes, there did.

17 Q. And where did you go then?

18 A. We went to a place, I believe the Beaver Press at
19 37 East Ferry Street, Buffalo, New York, myself, Agent
20 Brehm, Detective Hunter and another detective whose
21 name I don't know at this time.

22 Q. About what time was that?

23 A. I would say it was approximately noon. I am not sure of
24 my time.

25 Q. All right. Did there come a time when you went back to

S. J. ZONA

GOVERNMENT, DIRECT

1 Buffalo Police Headquarters again?

2 A. Yes.

3 Q. And at about what time did you arrive back there?

4 A. I would say about 12:30.

5 Q. And did there come a time when you saw this individual, -
6 an individual by the name of Greene Berry Mullens?

7 A. Yes.

8 Q. And about what time did you see him?

9 A. Well, about 2:15 or 2:20.

10 Q. And where was that?

11 A. That was also at Buffalo Police Headquarters.

12 Q. All right. Did you have any conversation with him at
13 that time?

14 A. Yes. I had been out and I returned to the Buffalo
15 Police Headquarters and he was in a conversation at that
16 time with Detective Sergeant Hunter and I believe
17 Chief of Detectives Degenhart in a private office and
18 I walked in and entered into the conversation.

19 Q. Okay, and what, if anything, did you say to Mr. Mullens
20 and what, if anything, did he say to you?

21 A. Well, I was introduced and explained, - and identified
22 as to who I was and at that present time they were in
23 the process of discord about what he should do, whether
24 he should cooperate, whether his parents would be arrested,
25 whether he should take this state or whether he should go

1 federally, what would be the best situation there and
2 within a few minutes, he agreed to cooperate fully with
3 us.

4 Q. Well, can you tell us specifically what, if anything, you
5 said to him and what, if anything, he said either to
6 your questions or anything he said in your presence in
7 response to questions of others, - Detective Hunter,
8 for example?

9 A. Well, yes, one thing I can remember him saying definitely
10 was that he had done this all by himself, he had bought
11 the press, bought the plates, manufactured the plates
12 and done the printing because Hunter asked him that and
13 he was very definite about what he had done, but he was
14 very worried about his parents' problem.

15 Q. Well, did you ask him any questions yourself?

16 A. Yes, I did.

17 Q. All right. Well, what questions did you ask and what,
18 if any, response did you get?

19 A. Well, I asked him if he had done this by himself and he
20 said "No". I am sorry, he said "Yes," he had done it
21 by himself and I told him "We really have the goods on
22 your mother as far as possession, we want full cooperation
23 at this point", and he agreed to that.

24 THE COURT:

Excuse me, Mr. Williams.

25 BY MR. WILLIAMS:

24-A

H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

GOVERNMENT, DIRECT

1 Q. Well, how long were you there in the presence of the
2 defendant Greene Berry Mullens?

3 A. At that point, no more than fifteen or twenty minutes.
4 Mr. Hunter executed a search, a consent search which I
5 signed also.

6 Q. Was that done in your presence?

7 A. Yes, it was.

8 Q. Do you recall what was said with respect to that?

9 A. He said this is where the press was, 1361 Fillmore
10 Avenue.

11 Q. Who said that?

12 A. Mr. Mullens and he would take us there.

13 Q. Do you recall Mr. Mullens signing anything at that
14 point?

15 A. He signed the consent search.

16 Q. Was there anything said to him at or near the time that
17 he signed that?

18 A. Nothing whatsoever in regards to, - I don't know what
19 you mean.

20 THE COURT: Did you tell him or say anything to
21 him about getting a search warrant,
22 anything like that?

23 THE WITNESS: No. We asked him if we could search
24 the premises where the press was and he
25 said "Yes" we could.

25-A

H. T. NOEL
OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

GOVERNMENT, DIRECT

1 BY MR. WILLIAMS:

2 Q. Was that the extent of your conversation with him at
3 that time?

4 A. At that point it was, yes, and we left Police Headquarters
5 immediately.

6 Q. When you say "we left Police Headquarters", who left
7 Police Headquarters?

8 A. Myself --

9 THE COURT:

Can we go back a minute. You told
10 us, Mr. Zona, that when you walked in the
11 room Degenhart and Hunter and Mr. Mullens
12 were in conversation and then you said
13 "He said that he wanted to cooperate", and
14 then Mr. Williams said "Well, please tell
15 us what he said and what you said about
16 it". Can you give us your best recollec-
17 tion about what he said so that, - you
18 know, you came to the conclusion he
19 wanted to cooperate. Why did you come
20 to that conclusion?

21 THE WITNESS:

He told us he wanted to cooperate,
22 if we did not lock up his mother.

23 THE COURT:

Anything said about his father?

24 THE WITNESS:

He seemed pretty upset about his
25 mother at that time.

26-A

H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

GOVERNMENT, DIRECT

1 THE COURT: Was there any further discussion
2 about that? You certainly wouldn't want
3 a person to confess to a crime that he
4 didn't do simply to protect his mother.

5 THE WITNESS: He told us he did it all, his parents
6 weren't --

7 THE COURT: Did you ask him some questions about
8 that?

9 THE WITNESS: Not at that time, sir. It was only
10 about fifteen or twenty minutes before
11 we started to go on to the next subject
12 which was leaving the building.

13 BY MR. WILLIAMS:

14 Q. Can you tell us, Mr. Zona, when you were in Buffalo
15 Police Headquarters with Sergeant Hunter and Degenhart
16 what the exact conversation was between you and Mr.
17 Mullens?

18 A. The most, - the thing I remember the most is he was
19 very concerned about cooperation, he would cooperate if
20 his parents were not arrested. I promised him in my
21 own words that if he cooperated, nobody else would be
22 arrested, based on what he told us. What we were
23 interested in was seizure of the counterfeit money, the
24 press, the plates, the camera and all the information
25 he could give me and he was agreeable to that. He said

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H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

GOVERNMENT, DIRECT

1 "Yes", he would do that and that promise he understood,
2 because he said a couple times that he would not give
3 anybody else's name up, which he hasn't. The conversation
4 was very brief at that point.

5 Q. Then there came a time that you left Buffalo Police
6 Headquarters?

7 A. Yes. Detective Hunter, myself, Agent Brehm and the
8 Defendant Mullens.

9 Q. You all left together?

10 A. Yes, we did.

11 Q. Did you get into a vehicle?

12 A. Yes, I drove my vehicle.

13 Q. And where did you go?

14 A. We went to 25 Wakefield Street in Buffalo, New York.

15 Q. And what did you do there?

16 A. I thought I was on my way to Fillmore. He says "No, we
17 got to stop by here first".

18 Q. Who said that?

19 A. Hunter, - I am sorry, Mullens. He said "We have to go
20 to Wakefield Street here", and we pulled up in front and
21 he said "I don't want anybody coming in but Detective
22 Hunter", so they both were in the back seat and they
23 both proceeded to go into what appeared to be a two-
24 family house and within minutes, I would say no more than
25 five minutes, they returned and Mullens was carrying a

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OFFICIAL REPORTER, U.S. DISTRICT COURT

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1 thin package wrapped in a newspaper. He got in the
2 back seat of the car again with Detective Hunter and we
3 proceeded around the corner and we opened up the package
4 and found plates, aluminum plates for the production of
5 currency.

6 Q. All right. Did Mr. Mullens say anything to you about
7 those plates?

8 A. He said that these were plates that he had prepared to
9 manufacture the money.

10 Q. All right, and where did you go from there?

11 A. We went to 1361 Fillmore Avenue. I was still driving.

12 Q. All right, and how did you come to go to 1361 Fillmore
13 Avenue?

14 A. He showed us the way. He said this is where the press
15 was.

16 Q. All right, and did you go in 1361 Fillmore Avenue?

17 A. Yes.

18 Q. And can you describe that structure or building for us?

19 A. Yes. It appears, - it is a broken down two-family house,
20 I believe with a store front or somewhat of a store front.
21 We went in the driveway around the back and proceeded to
22 go into the house. It is not suitable for a residency
23 and he showed us, first of all --

24 Q. When you say it is not suitable for residency, that is a
25 conclusion. Was it occupied or unoccupied at the time?

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H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

GOVERNMENT, DIRECT

1 A. Unoccupied at the time, no furniture or anything else
2 in there.

3 Q. And what did you do?

4 A. First he showed us right at the back door was a lock and
5 a bolt on it, there was some ashes, an ash can.

6 Q. When you say he showed you --

7 A. Mr. Mullens, there was a trash can where he said he had
8 destroyed some of the counterfeit money earlier that
9 day.

10 Q. Continue.

11 A. Okay. Then he opened the door. He had a key, I believe,
12 and we went upstairs first, very, very dark, and he led
13 the way and when we got upstairs, immediately to the
14 left was a large room with a press sitting there, a
15 completely operational press at that point.

16 Q. All right. What kind of a press was it?

17 A. It was a Davidson offset press.

18 Q. All right. Did Mr. Mullens make any statements to you
19 with respect to that press?

20 A. Yes. He said this is where he had printed the money.
21 He showed us a paper which was lying in a bundle on the
22 floor near the press and the table with various compounds,
23 mixing solutions, plus a camera was also there.

24 Q. All right. Did there come a time when you left that
25 premises?

30-A

H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

GOVERNMENT, DIRECT

1 A. Yes. Prior to leaving we photographed the complete
2 operation and then he also showed us down the cellar
3 where he had burned additional counterfeit money and
4 we took pictures of that.

5 Q. All right. About what time did you leave 1361 Fillmore?

6 A. I would say it was around 5:00 o'clock. I am not sure
7 of the time. It was late in the afternoon.

8 Q. And where did you go from there?

9 A. We returned to --

10 THE COURT: Before that eventually did you move
11 the press and other equipment out of
12 there?

13 THE WITNESS: Yes, eventually.

14 THE COURT: Did you take it into your custody?

15 THE WITNESS: Yes, sir.

16 THE COURT: Go ahead, Mr. Williams.

17 BY MR. WILLIAMS:

18 Q. Where did you go from there?

19 A. We returned to this building.

20 Q. When you say "we returned", who was in your presence?

21 A. Agent Brehm, the defendant and Detective Hunter, the four
22 of us again returned.

23 Q. All right, and you came back to this building?

24 A. Yes. At that time our office was located here.

25 Q. And what, if anything, happened when you got back?

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H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

GOVERNMENT, DIRECT

1 A. Well, arrangements had been set up previously for
2 arraignment and the paperwork was set up in our office
3 and Mr. Mullens was arraigned.

4 Q. Was Mr. Mullens placed under arrest?

5 A. He was placed under arrest in Mr. Hunter's office.

6 Q. Who placed him under arrest?

7 A. I did.

8 Q. And about what time was that?

9 A. That was around 2:00 o'clock or 2:15.

10 Q. All right. When you got back to this office, your
11 office here in this building, about what time was that?

12 A. It was around 5:00.

13 Q. All right. Did you have any conversation with Greene
14 Berry Mullens at that time?

15 A. After the arraignment he was brought down to our office
16 and readvised of his Constitutional rights by me.

17 Q. What did you advise him?

18 A. Well, I advised him orally and on a written form that he
19 had the right to remain silent; anything he would say
20 could be used against him in a court of law; that he had
21 a right to an attorney; he had a right to have an
22 attorney present at the time if he wanted to and if he
23 waived his right for an attorney, he could stop the
24 questioning at anytime for the purpose of obtaining an
25 attorney or for just to stop the questioning.

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H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS OF MAY 14, 1974
S. J. ZONA
DEFENSE, CROSS

1 MR. WILLIAMS: I have no more questions.

2

3 CROSS EXAMINATION BY MR. LALIME:

4 Q. Agent Zona, when Sergeant Tadisco called you on the
5 phone, did he tell you what the essence of the investiga-
6 tion was going to be?

7 A. No. He said it was about counterfeiting.

8 Q. All right, and when you got over to his office in the
9 Special Fraud Squad, is that where you --

10 A. That is where I went initially, yes, sir.

11 Q. And you were brought down to the Homicide Squad?

12 A. Yes.

13 Q. And at that time --

14 THE COURT: Mr. Williams, after Mr. Zona, do you
15 have some other witnesses?

16 MR. WILLIAMS: I have Agent Brehm. That would be
17 the last witness.

18 THE COURT: All right. There are some things
19 that I have to do and then at 2:00 also
20 briefly meet with some other people. I
21 think we can probably resume at about
22 2:30.

23 MR. WILLIAMS: Very good.

24 MR. LALIME: Fine, your Honor.

25

33-A

S. J. ZONA

DEFENSE, CROSS

1 THE COURT:

All right. We will be in recess.

2
3 (Recess taken at 12:50 p.m.)
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* * * * *

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24 34-A
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S. J. ZONA

DEFENSE, CROSS

1 PROCEEDINGS: May 14, 1974, 2:45 p.m.

2 APPEARANCES: As before noted.

3 (Defendant present.)

4

5 S A M U E L J. Z O N A, a witness called by and in behalf
6 of the Government, having been previously duly sworn, resumed
7 the witness stand and testified further as follows:

8

9 CROSS EXAMINATION BY MR. LALIME: (Resumed)

10 Q. Agent Zona, when you met Sergeant Hunter, did he tell
11 you basically what he was looking for?

12 A. Yes.

13 Q. And what did he tell you?

14 A. He told me that on the evening before which would have
15 been a Thursday, he had been approached by a confidential
16 informant of his who advised that he had seen plates and
17 negatives and counterfeit tens and twenties in the
18 possession of the defendant and that now this was located,
19 this particular suitcase, he said, was located at the
20 defendant's residence at 1536 Jefferson Avenue.

21 Q. Did he say that he saw the suitcase in his possession
22 in the house or did he say it just the way you said it
23 then?

24 A. I don't know. I mean this is what he told me. I don't
25 know what his man told him.

35-A

S. J. ZONA

DEFENSE, CROSS

1 Q. All right. Basically what he told you was that he saw
2 the suitcase in the possession of Mr. Mullens?

3 A. Mr. Mullens.

4 Q. And now this suitcase was in the house?

5 A. Yes.

6 Q. Did that infer that the informant had been in the house
7 to you or did it infer that he wasn't or she wasn't in
8 the house?

9 A. Didn't infer neither. I didn't think much of it.

10 Q. Did he say, - did Detective Sergeant Hunter say to you
11 that there was plates and money?

12 A. I believe he did, yes.

13 Q. Did he say it was in the container?

14 A. He said it was in a suitcase.

15 Q. Did he describe the suitcase to you?

16 A. No, he did not.

17 Q. Did he tell you where the suitcase was located?

18 A. At the house.

19 Q. Just at the house?

20 A. Just at the house.

21 Q. Did he describe the house to you?

22 A. No.

23 Q. But you did look at the affidavit?

24 A. Yes, I did. In fact, I obtained a copy of the affidavit
25 and a copy of the search warrant.

S. J. ZONA

DEFENSE, CROSS

1 Q. And it said for the premises under the control of the
2 Mullenses at 1536 Jefferson Avenue, is that right?

3 A. I don't have it in front of me. I am sorry.

4 Q. Did you find a suitcase full of money or counterfeit
5 money at 1536?

6 A. There are two questions there.

7 Q. Did you find a suitcase full of money at 1536?

8 A. No.

9 Q. Did you search the lower premises at 1536 Jefferson
10 Avenue?

11 A. No.

12 Q. Did you find a suitcase at the premises of 1536 Jefferson
13 Avenue?

14 A. We found several suitcases.

15 Q. Several suitcases, and what color, do you recall offhand?

16 A. No, sir.

17 Q. Did you take any of these suitcases for identification or
18 for evidence at a later date?

19 A. No, sir.

20 Q. And you didn't think this was necessary at this time?

21 A. No, sir. They were full of clothes.

22 Q. They were all full of clothes?

23 A. The ones I recall looking through.

24 Q. And none of them had plates or money in them, did they?

25 A. None of the suitcases, no.

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H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

DEFENSE, CROSS

1 Q. Now, the first time that you met Greene Berry Mullens
2 was down at Police Headquarters, is that right?

3 A. Yes, sir.

4 Q. And you said --

5 THE COURT: Excuse me, Mr. Lalime. Go ahead,
6 Mr. Lalime.

7 BY MR. LALIME:

8 Q. Agent Zona, what time was this at Police Headquarters
9 that you first saw Mr. Mullens?

10 A. Again, 2:15, 2:30 p.m.

11 Q. And was he in custody at the time?

12 A. He was in one of the offices there. He was being, -
13 yes, he was being detained.

14 Q. And you talked to him at that time?

15 A. I didn't hear your question.

16 Q. Did you start to talk to him?

17 A. Yes, I did.

18 Q. And you told him that in essence, "Berry, we have the
19 goods on your mother in view of the fact that she had
20 the counterfeit money in her possession", is that right?

21 A. Well, I told him that she was in a lot of trouble and
22 he admitted to that.

23 Q. Give me what you said in essence, please.

24 A. In essence after I was introduced and Mr. Hunter advised
25 me he had been advised of his rights he had already gone

S. J. ZONA

DEFENSE, CROSS

1 through part of the situation and I said "Well, you know
2 we have your mother, she sat on the bag of counterfeit
3 money and we are looking for complete cooperation on
4 your part".

5 Q. And did you tell him at that time that if he would come
6 clean and give you the information that you wanted
7 concerning the counterfeit money and the plates that you
8 wouldn't press charges against his mother?

9 A. It wasn't just his mother was involved in the discussion.
10 It was everybody. He said he didn't want to involve
11 anybody whatsoever.

12 Q. But anybody didn't have possession of the counterfeit
13 money. It was his mother that had possession of the
14 counterfeit money, is that right?

15 A. Yes.

16 Q. And that is the one you had, quote, the goods on, at that
17 time, is that right?

18 A. Yes.

19 Q. And that's what he knew when he got to that Police
20 Headquarters, that his mother had been detained by the
21 Buffalo Police Department for possession of counterfeit
22 money, is that right?

23 A. I don't know.

24 Q. You don't know?

25 A. What he knew.

S. J. ZONA

DEFENSE, CROSS

1 Q. But you knew that she was down there?

2 A. Yes.

3 Q. And you knew that she wasn't charged yet, is that right?

4 A. I didn't know if she was or not.

5 Q. By the way, Agent Zona, has she ever been charged with
6 a Federal crime?

7 A. Has she?

8 Q. Has she, yes.

9 A. Not to my knowledge. I have never done any background
10 work on her. I don't know whether she has ever been
11 charged or not. I don't know.

12 Q. Do you know if previously to this arrest and search of
13 Greene Berry Mullens that he was charged with a Federal
14 crime?

15 A. Previous, no.

16 Q. Did you have any previous investigations concerning
17 Mr. Greene Berry Mullens' distribution, issuance or
18 otherwise handling counterfeit money?

19 A. Of the defendant, no.

20 Q. You had no prior communications with Detective Sergeant
21 Hunter regarding counterfeit money in the Buffalo area,
22 is that right?

23 A. That's correct.

24 Q. Now, Agent Zona, you said that you were accompanied, -
25 that you accompanied Mr. Mullens, Detective Sergeant

S. J. ZONA

DEFENSE, CROSS

1 Hunter and Agent --

2 A. Brehm.

3 Q. Brehm to some premises on Wakefield Street?

4 A. Yes.

5 Q. And at that time Mr. Mullens took Mr. Hunter into the
6 premises at 25 Wakefield, was it?

7 A. I believe it was 25, yes, sir.

8 Q. And do you know was there any consent to search or any
9 permission asked of Mr. Mullens to search these premises
10 at 25 Wakefield?

11 A. He took us there completely voluntarily.

12 Q. And at that particular place you saw a newspaper that
13 had wrapped around, -been wrapped around counterfeit
14 plates, is that right?

15 A. Well, we went around the corner and opened it up at that
16 time.

17 Q. All right. And was it a Buffalo paper?

18 A. Yes, I believe it was.

19 Q. And do you recall the date on that paper?

20 A. No, sir, I do not.

21 Q. Could it have been the 6th of December?

22 A. I don't recall.

23 Q. Do you have that in evidence here today?

24 A. The newspaper?

25 Q. It wasn't introduced. It wasn't introduced, but as far

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H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

DEFENSE, CROSS

1 as you know there was no waiver or consent given by
2 Mr. Mullens to Detective Sergeant Hunter?

3 A. It was a consent but it was oral.

4 Q. It was given in your presence, was it?

5 A. Yes.

6 Q. And again he was advised of his rights he didn't have to
7 allow the search of these premises and so forth?

8 A. Well, I never gave him his rights at that point. I don't
9 know about Mr. Hunter. During the entire trip in the
10 car he was making statements, to the various places, he
11 was making statements and completely cooperative the
12 whole while.

13 Q. Now we come to Government Exhibit marked Number 9 for
14 identification which is the waiver of rights. Now, this
15 is the warning that you normally give to an individual,
16 a subject that is in custodial care, is that right, or
17 if you want to search the premises of an individual, this
18 is the usual waiver of rights, is that right?

19 A. No. This is a waiver of rights in regards to statements,
20 nothing to do with search.

21 Q. And if you follow the warning of the waiver of rights
22 down on Government Exhibit Number 9 to the part where it
23 says "Waiver of rights" in bold print --

24 A. Yes.

25 Q. Would you read the fourth sentence on that waiver of

S. J. ZONA

DEFENSE, CROSS

1 rights.

2 A. "No promises or threats have been made to me and no
3 pressure or coercion of any kind has been used against
4 me."

5 Q. Now, the threat of the fact that you stated to Mrs.
6 Mullens or to Berry Mullens that his mother was going to
7 be put in jail or words similar to that effect if he
8 didn't cooperate, that is not a promise, is it, or a
9 threat?

10 A. I don't consider it a threat or a promise.

11 Q. How about the fact his mother would not be prosecuted
12 for the crime of criminal possession of the alleged
13 counterfeit money, is that a promise?

14 A. That was him doing all the dealing. I just agreed with
15 him. He is the one brought it all up.

16 Q. But it was a promise or would you call it a promise or
17 not?

18 A. Yes.

19 Q. Okay. Agent Zona, did you ever talk to the informant
20 personally on this particular case?

21 A. Yes.

22 Q. Of Agent Hunter?

23 A. Yes.

24 Q. Did this informant tell you that he or she saw the goods
25 at these particular premises?

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OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

DEFENSE, CROSS

1 A. No.

2 Q. Did they tell you they didn't see them there?

3 A. No.

4 Q. Did they tell you that Greene Berry Mullens had them in
5 his possession, is that right?

6 A. I never talked to them about the case at point.

7 Q. But you talked to the informant?

8 A. Yes, I have.

9 Q. Before or after?

10 A. After.

11 Q. Your department didn't do any independent investigation
12 on this matter before the search warrant was issued,
13 did it?

14 A. No.

15 Q. You didn't conduct a surveillance to see if known
16 counterfeiters were coming and going from 1536 Jefferson
17 Avenue, did you?

18 A. No.

19 Q. You didn't in fact inquire on the street whether in fact
20 Greene Berry Mullens was passing counterfeit money, did
21 you?

22 A. No.

23 Q. So in essence you didn't know whether Greene Berry Mullens
24 was involved in any crime at this particular time, is
25 that correct?

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H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

S. J. ZONA

DEFENSE, CROSS

1 A. That's correct.

2 MR. LALIME: I have no further questions.

3

4 REDIRECT EXAMINATION BY MR. WILLIAMS:

5 Q. Mr. Zona, you indicated you talked to Mr. Hunter's
6 informant, is that correct?

7 A. Yes.

8 Q. And what was the subject matter of your conversation?

9 A. Reward.

10 Q. Did you ever discuss the facts of this particular case
11 with that informant?

12 THE COURT: Is this before or after the search
13 warrant?

14 BY MR. WILLIAMS:

15 Q. Okay. Before the issuance of the search warrant, did
16 you talk to Mr. Hunter's informant?

17 A. No, sir.

18 Q. Did you talk to the informant after?

19 A. Yes, sir.

20 Q. And when was that, what day?

21 A. I talked to him on two occasions. The first time I
22 would say just prior to Christmas. I do not recall the
23 date.

24 Q. Did you discuss the facts of this particular case with
25 that informant?

45-A

H. T. NOEL

OFFICIAL REPORTER, U.S. DISTRICT COURT

United States Court of Appeals for the Second Circuit

THE UNITED STATES OF AMERICA

Plaintiff

Appellee

against

Docket No. 75-8374

GREEN BARRY MULLENS

Appellant Defendant

State of New York

County of Erie

I ss.:
I

Judith M. Halladay being duly sworn and deposes and says that she is over 18 years of age and not a party to this action; that on the 11th day of February 19 76 at approximately 6:00 PM AM at William Street Post Office Building, Buffalo, New York deponent served the annexed Brief and XX Appendix on Roger P. Williams, the defendant named herein, in the following manner: Asst. U. S. Attorney, U. S. Courthouse 68 Court Street, Buffalo, New York personally a true copy thereof, and that he knew the person so served to be the person mentioned and described in said

☐ Ind.☐ Corp.

By delivering to and leaving with the person so served to be

and he knew of defendant corporation

☐ Resp.
☐ Person

By delivering to and leaving with () a true copy thereof, a person of suitable age and discretion. Said premises being the defendants (dwelling place) (usual place of abode) (place of business) within the state of New York.

☐ Sub.
☐ Ser.

By affixing a true copy thereof to the door of said premises the same being the defendants (dwelling place) (usual place of abode) (place of business) within the State of New York.

XX Mail

Deponent also served a copy of the Brief & Appendix by depositing a true copy of the same in a postpaid, properly addressed envelope in an official depository under the exclusive care and custody of the United States post office in the State of New York.

☐ Prev.
☐ Attp.

Deponent had previously attempted to serve the above named defendant at _____ on the _____ day of _____ 19 _____ PM _____ AM
at _____ on the _____ day of _____ 19 _____ PM _____ AM
at _____ on the _____ day of _____ 19 _____ PM _____ AM

☐ Descrip.

The person served would be described as approximately _____ years of age _____ lbs.
ft. in. male female hair skin
eyes other

☐ Military

That at the time of service, defendant admitted that he was not a member of the military service of the United States.

Sworn to before me this

11th day of February 19 76

James L. Lalime
JAMES L. LALIME
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 19 _____

Judith M. Halladay

United States Court of Appeals for the Second Circuit

THE UNITED STATES OF AMERICA

Plaintiff

Appellae

against

Docket No. 75-8374

GREEN BARRY MULLEN

Appellant Defendant

State of New York

County of Erie

} ss.:
}

Julith M. Halladay being duly sworn and deposes and says that she is over 18 years of age and not a party to this action; that on the 11th day of February 19 76 at approximately 6:00 PM AM at William Street Post Office Building, Buffalo, New York deponent served the annexed Brief and on Appendix on Roger P. Williams, the defendant named herein, in the following manner: Asst. U. S. Attorney, U. S. Courthouse By delivering to and leaving with said 68 Court Street, Buffalo, New York personally a true copy thereof, and that he knew the person so served to be the person mentioned and described in said

☐ Ind.☐ Corp.

By delivering to and leaving with the person so served to be and he knew of defendant corporation

☐ Resp.
☐ Person

By delivering to and leaving with () a true copy thereof, a person of suitable age and discretion. Said premises being the defendants (dwelling place) (usual place of abode) (place of business) within the state of New York.

☐ Sub.
☐ Ser.

By affixing a true copy thereof to the door of said premises the same being the defendants (dwelling place) (usual place of abode) (place of business) within the State of New York.

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☐ Attp.

Deponent had previously attempted to serve the above named defendant at _____ on the _____ day of _____ 19 _____ PM _____ AM at _____ on the _____ day of _____ 19 _____ PM _____ AM at _____ on the _____ day of _____ 19 _____ PM _____ AM

☐ Descrip.

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☐ Military

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Sworn to before me this

11th day of February 19 76

JAMES L. LALIME
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

Julith M. Halladay